IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

SA.No. 451 of 1992()

AS.61/1988 of DISTRICT COURT, MANJERI
OS.36/1983 of SUB COURT, TIRUR
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APPELLANTS/APPELLANTS/PLAINTIFF:
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1. EDAKKADAN ALAVI HAJI, S/O.AHAMMED RESIDING AT VALAKULAM AMSOM AND DESOM, TIRUR TALUK

DIED LRs IMPLEADED AS ADDL.APPELLANTS 2 TO 7 AS PER ORDER DATED 11/4/2001 ON CMP 305/01

2. UMMACHU, AGED 65, W/O.LATE EDAKKANDAN ALAVI HAJI, EDAKKANDAN HOUSE, PUDUPPRAMBA.P.O., EDARIKODE, MALAPPURAM DISTRICT 676501

3. FATHIMA, AGED 45 YEARS, D/O.LATE EDAKKANDAN HAJI, EDAKKANDAN HOUSE, PUDUPPRAMBA.P.O., EDARIKODE, MALAPPURAM DISTRICT 676501

4. KADEEJA, AGED 43 YEARS, D/O.LATE EDAKKANDN ALAVI HAJI EDAKKANDAN HOUSE, PUDUPPRAMBA.P.O. EDARIKODE, MALAPPURAM DISTRICT 676 501

5. NAFEESA AGED 37 YEARS, D/O.LATE EDAKKANDAN ALAVI HAJI, EDAKKANDAN HOUSE, PUDUPPRAMBA P.O., EDARIKODE, MALAPPURAM DISTRICT 676 501

6. HAMZA, AGED 32 YEARS, S/O.LATE EDAKKANDAN ALAVI HAJI, EDAKKANDAN HOUSE, PUDUPPRAMBA P.O., EDARIKODE, MALAPPURAM DISTRICT 676 501

7. RAHIM, AGED 28, S/O.LATE EDAKKANDAN ALAVI HAJI, EDAKKANDAN HOUSE, PUDUPPRAMBA P.O., EDARIKODE, MALAPPURAM DISTRICT 676 501.

ADDL.APPELLANTS 8 TO 10 ARE ALSO IMPLEADED AS Lrs OF DECEASED SOLE APPELLANT AS PER ORDER DT.9/7/02 ON CMP 1313/01

ADDL.A8 EDAKKANDAN AHAMMED, S/O.LATE EDAKKANDAN ALAVI HAJI, EDAKKANDAN HOUSE, PUDUPPARAMBIL P.O. EDARIKODE, MALAPPURAM DISTRICT.

A9 EDAKKANDAN MOIDEED, -DO- -DO-

A10 EDAKKANDAN MOOSA -DO- -DO-

BY ADV. SRI.K.P.DANDAPANI
SMT.SUMATHY DANDAPANI

RESPONDENTS/RESPONDENTS/DEFENDANTS:
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1. P.AYISSAKUTTY UMMA, W/O.P.VEERAN HAJI

(DIED. LRs. IMPLEADED)
2. MAMMEERIYA UMMA, W/O.E.POKKU
3. POOKKAYIL KATHIYUMMA, W/O.C.H.ABDURAHIMAN

4. PALERI MUHAMMEDKUTTY HAJI'S CHILDREN PALERI SAIDALIKUTTY

5. AHAMMEDKUTTY, S/O.PALERI MUHAMMEDKUTTY HAJI

6. ABDURAHIMAN ALIAS BAVA, -DO-

7. MOIDU, DO.

8. ABDUL MAJEED, DO.

9. ABDUL HAMEED, DO.

10. ABDUL NAZAR, DO.

11. ABDUL JABBAR, DO.

12. JAMEELA, D/O.PALERI MUHAMMEDKUTTY HAJI

13. SHANEEF, S/O. DO.

14. PALERI MUHAMMEDKUTTY HAJI

15. POOKKAYIL MUHAMMEDKUTTY HAJI'S CHILDREN AMAMMEDKUTTY.

16. KUNHIKATHIYUMMA

17. AYDROSE

18. AYISSABI

19. ABDUL GAFOOR

RESPONDENTS 1,2 AND 15 TO 19 RESIDING AT VALAKULAM AMSOM DESOM, TIRUR TALUK. 3RD RESPONDENT AT TIRURANGADI AMSOM

AND DESOM, TIRUR TALUK, RESPONDENTS 4 TO 14 RESIDING AT PALLIKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DIST.

LRs. OF DECEASED R1 ARE IMPLEADED AS SUPPL.RESPONDENTS 20 TO 26 AS PER ORDER DT.16/5/05 ON IA.709/03

20. POOKKAYIL AHAMMEDKUTTY, S/O.VEERAN HAJI, POOKKAYIL HOUSE, PUTHUPARAMBU.P.O., EDARIKODE VIA., MALAPPURAM DISTRICT.

21. POOKKAYIL MOIDU, S/O. DO. DO.

22. POOKKAYIL KUNHIMUHAMMED, S/O. DO. DO.

23. POOKAYIL MAMMADU, S/O. DO. DO.

24. POOKAYIL KADEEJA, D/O. DO. DO. W/O.CHEERANGAN KUNHALAVI, IRINGALLOOR.P.O. KOTTAKKAL VIA., MALAPPURAM DISTRICT

25. POOKKAYIL MAMATHU, D/O. DO. W/O.ARIMBRA ALAVIKUTTY, THENNALA.P.O., VALAKULAM VIA, MALAPPURAM DISTRICT

26. POOKKAYIL PATHUMMAKUTTY, D/O. DO. W/O.ALUNGAL ABU, RANDATHANI.P.O., KOTTAKKAL VIA., MALAPURAM DISTRICT

BY ADV. SRI.K.K.UNNI
SRI.T.KRISHNAN UNNI
SRI.P.CHANDRASEKHAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/2/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO. 877/92 & 1132/95 IN SA 451/92

DISMISSED

27/2/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 451 OF 1992

Dated 27th February 2007

J U D G M E N T

Plaintiff in O.S.36/1983 on the file of Sub court, Tirur is challenging the concurrent decree and judgment in this second appeal. On the death of appellant additional appellants 2 to 10 were impleaded as his legal heirs. Respondents are the defendants in the suit. On the death of first respondent additional respondents 20 to 26 are impleaded as her legal heirs. Appellants instituted the suit seeking a decree for declaration that Ext.B3 decree obtained by first respondent in O.S.212/1978 on the file of Munsiff court, Parappanangadi is not valid and binding on plaint schedule property or on the appellants and the property cannot be divided in accordance with Ext.B3 decree. Appellants also sought a decree for injunction restraining respondents from proceeding under Ext.B3 decree.

2. Plaint schedule properties admittedly originally belonged to Moidutty Haji and his wife

Pathummakkutty Umma. They had one son deceased Muhammedkutty and five daughters. They are first respondent Ayissakutty Umma, Kunheema Umma, Mammeeriya Umma, Kunhathumma and Kathiyumma. Kunheema Umma, the sister of first respondent filed O.S.99/1963 on the file of Munsiff court, Parappanangadi for partition of the properties which devolved on legal heirs of Moidutty Haji and Pathummakutty. That suit was tried along with O.S.61/1963 filed by Muhammedkutty, brother of first respondent seeking a decree for declaration and injunction and O.S.563/65, a suit instituted by plaintiff in O.S.99/1963. In that suit first defendant therein namely, Muhammedkutty contended that his sister Mammeeriya Umma had transferred her right in favour of Kunhathumma who in turn assigned that right along with her right in favour of Muhammedkutty and therefore rights of Kunhathumma, Mammeeriya Umma, the two daughters of Moidutty Haji and Pathummakutty Umma vested in him. It was also contended that rights of Kathiyumma fifth defendant in that suit was also transferred in favour of Muhammedkutty. Muhammedkutty also contended that during pendency of the suit rights of plaintiff in that suit viz. Kunheemaumma was also released to him and he obtained the shares of all others except second

defendant, the first respondent herein. Kunheemaumma had filed O.S.563/65 to set aside the release deed executed by her in favour of Muhammedkutty contending that it is invalid. Learned Munsiff under Ext.B1 common judgment found that court has no pecuniary jurisdiction to try O.S.563/65 and returned the plaint to plaintiff Kunheemaumma for presentation before proper court. It is submitted at the Bar that subsequently Kunheema Umma represented the plaint before proper court and the release deed executed by Kunheemaumma in favour of Mohammedkutty was set aside. Under Ext.B1 judgment learned Munsiff rejected the contentions of Muhammedkutty that because of Ext.B2 partition deed therein (Ext.A1 partition deed in the present suit) plaint schedule property is not available for partition. On the other hand, it was found that Kunheemaumma is entitled to her share separated. A preliminary decree for partition of 2 out of 14 shares of Kunheemaumma was passed. It is admitted at the Bar that subsequently a final decree was also passed and properties allotted to Kunheemaumma was also taken possession of. Subsequent to that preliminary decree, according to appellants, Muhammedkutty assigned his right over plaint schedule property in favour of Edakkandathil Kunheethu Haji as per

sale deed dated 17/7/1965 and assignee sold it to Moossakutty Haji under Ext.A2. Appellants contended that half right of Moossakutty Haji was transferred to Korattil Kunhahammed under Ext.A3 and it was transferred to Cholakkalthodi Moideen Haji and Cholayil Ali under Ext.A5 and later under Ext.A6 assignment deed dated 20/12/1975 appellants purchased the right and therefore he obtained half right of Muhammedkutty, which was transferred under the documents referred to earlier. It is the further case of appellant that remaining half share of Moossakutty Haji was transferred in favour of Korattil Muhammed and Alavi under Ext.A4 and under Ext.A7 sale deed dated 24/2/1977 it was also purchased by appellant and therefore plaint schedule property belongs to him absolutely. It was contended that factum of release deed executed by sisters of Muhammedkutty and assignment deed executed by Muhammedkutty in favour of appellant were suppressed from the court when first respondent filed O.S.212/1978 seeking a decree for partition of the entire properties and Ext.B2 judgment was the result of fraud and collusion and Ext.B2 judgment and Ext.B3 decree in O.S.202/1978 are not valid and binding on the appellant or plaint schedule properties. Appellant sought a decree for that declaration in

O.S.36/1983 instituted before Sub court Tirur.

3. In O.S.212/1978 first respondent sought partition of the entire plaint schedule properties impleading Kunheema Umma also, as if Ext.B1 judgment in O.S.99/1963 is not binding on her. But during the pendency of that suit, realising that first respondent is bound by the decree in O.S.99/1963, first respondent got Kunheema Umma, 3rd defendant therein deleted from party array. So also, claiming that properties allotted to Kunheema Umma in the final decree in O.S.99/1963 were available for partition was given up. Pursuant to that development under Exts.B2 and B3, learned Munsiff granted a preliminary decree for partition and separation of the share of first respondent over plaint schedule properties, excluding the properties allotted to Kunheema Umma under the final decree in O.S.99/1963.

4. In the present suit appellant contended that the decree in O.S.212/1998 is not binding on him as he was not impleaded in that suit in spite of the fact that he purchased the rights from Muhammedkutty and the assignments in his favour and the release deed executed by other sharers in favour of his assignor were suppressed. It was also contended that though the release deeds executed by the other sharers, the sisters of

Muhammedkutty were during the pendency of O.S.99/63 and at best the transfers could only be subject to the decree in that suit and Muhammedkutty and first respondent divided the property under Ext.A1 partition deed admitting all the release deeds and therefore first respondent was not entitled to get the decree in O.S.212/1978 and therefore Ext.B3 decree is not binding on appellant or plaint schedule properties. Learned Munsiff framed the necessary issues. On the evidence of PW1, DW1 and Exts.A1 to A7 and Exts.B1 to B6, learned Munsiff found that appellant is not entitled to the decree sought for and dismissed the suit. Appellant challenged the decree and judgment before District court, Manjeri in A.S.61/1988. Learned District Judge on re-appreciation of evidence confirmed the decree and judgment and dismissed the appeal. Learned District Judge held that right of appellant is only to claim the share due to Muhammedkutty by filing separate suit for partition. This second appeal is filed challenging concurrent findings of courts below.

5. Appeal was admitted after formulating the following substantial questions of law.

1) Does the rule of iis pendens apply to the facts of the case?

2) Is the plaintiff-appellant bound by the decree in the partition suit?

6. Learned counsel appearing for appellants and learned counsel appearing for respondents 20 to 26 the legal heirs of deceased first respondent were heard.

7. Arguments of learned counsel appearing for appellants was that release deed executed by Kunheema Umma, Mammeeriya Umma and Kathiyumma in favour of their brother Muhammedkutty are valid and binding on them and after deriving the shares of his sisters, Muhammedkutty and first respondent Ayissakutty Umma divided the properties between them under Ext.A1 and the rights thereby obtained by Muhammedkmutty was assigned by him and under Exts.A6 and A7 appellant obtained the entire properties. It was argued that though the rights obtained by Muhammedkutty from his sisters were during the pendency of O.S.99/1963, the release deeds are not void and applying the doctrine of lis pendense rights of Muhammedkutty or appellant under the release deeds cannot be challenged. It was argued that at best it could be contended that rights obtained by Muhammedkutty during the pendency of O.S.99/1963 are subject to the result of the decree in O.S.99/1963 and as and when the sharers obtained the right that right

would vest with Muhammedkutty and by assignment deed executed by Muhammedkutty the right would vest with appellant. It was argued that appellant is entitled to the shares for which Muhammedkutty was entitled to including the shares obtained by him from his sisters by the release deeds. Relying on the provisions of Section 43 of Transfer of Properties Act, learned counsel appearing for appellants argued that as and when sisters derived shares by the principles of feeding the grant by estoppel, that shares would vest with first defendant and by virtue of Exts.A6 and A7 assignment deeds appellant derived that right and therefore decree in O.S.212/1978 is not valid and binding on appellant especially when he was not impleaded in the said suit, even though the assignment deeds in his favour was much prior to institution of that suit. The learned counsel relied on the decision of Apex court in **Renu Devi v. Mahendra Singh and others (2003 (10) SCC 200)** to strengthen the arguments. It was argued that Muhammedkutty first defendant therein who was the assignor of appellant suppressed all true facts and defendants 2,4 and 5 who released their rights in favour of first defendant did not disclose it and thereby

suppressed the rights of appellant and fraudulently obtained the decree in O.S.212/1978. It was argued that Ext.B2 and B3 are results of fraud and collusion and not valid and binding on appellants. Relying on the decisions of Apex court in **S.P.Chengalvaraya Naidu v. Jagannath and others** (**1994 (1) SCC 1) and Ram Chandra Singh v. Savitri Devi and others (2003 (8) SCC 319)** it was argued that Exts.B2 and B3 are vitiated by fraud and collusion and courts below should have found that the decree in O.S.212/1978 is not binding on appellant or plaint schedule properties.

8. Facts are not disputed. Plaint schedule properties originally belonged to Moideenktty Haji and Pathummakutty Umma. Muhammedkutty, Kunheema Umma, Kunhathumma, Ayissakutty Umma (first defendant), Mammeeriya Umma (second defendant) and Kathiyumma (third defendant) are their children. Defendants 15 to 19 are legal heirs of Muhammedkutty. Defendants 4 to 14 are legal heirs of Kunhathumma. Kunheema Umma claimed partition and separation of her 1/7th share in O.S.99/1963. Under Ext.B1 judgment, learned Munsiff has already found that she is entitled to get her share separated. Preliminary decree was passed. It is admitted

at the bar that final decree was also passed and properties allotted to Kunheema Umma under the final decree were already taken delivery by her. In this suit also appellant did not challenge the decree in O.S.99/1963. Mohammedkutty the assignor of appellants was the contesting first defendant in O.S.99/1963 and the plaintiff in the connected O.S.61/1963 instituted seeking a decree for declaration and injunction. In O.S.99/1963 Mohammedkutty raised a contention that except him other children of Moideenkutty are not entitled to a share. During the pendency of the suit, Mohammedkutty got released the rights of Kunheema Umma and claimed in the suit that she is not entitled to a share. Kunheema Umma in turn filed O.S.563/1965 seeking a decree for cancellation of the release deed executed in favour of Mohammedkutty. That suit was returned for presentation before proper court as Munsiff has no pecuniary jurisdiction to try the suit. Neverthless under Ext.B1 judgment, Munsiff held that Kunheema Umma in spite of the release deed is entitled to her share. The preliminary decree so passed has become final. It was also admitted at the bar that O.S.563/65 which was returned, was presented before Sub court and the suit was decreed and the release deed was cancelled.

9. After separation of 1/7th share Kunheema Umma out of the other six legal heirs of Moidukutty, whose shares were kept common under the preliminary decree in O.S.99/1963, Ayissakutty first respondent herein instituted O.S.212/1978 before Munsiff court claiming her separate share. Under Ext.B2 judgment and Ext.B3 decree learned Munsiff passed a preliminary decree and directed separation of her 1/6th share. Arguments of learned counsel appearing for appellants was that first respondent along with deceased Muhammedkutty partitioned the properties under Ext.A1 and the rights obtained by Muhammedkutty was transferred by him under Ext.A2 assignment deed and vested with appellants under Exts.A6 and A7 and he should have been made a party in O.S.212/1978 and as he was not made a party the decree is not binding by him. It was argued that as defendants who released their rights earlier in favour of Mohammedkutty and Mohammedkutty who suppressed the release deed executed by defendants 2, 4 and 5 and Ext.A2 assignment deed and thereby played a fraud on the court and it vitiates Ext.B3 decree.

10. O.S.212/1978 was filed by first respondent who admittedly did not release her right in favour of Muhammedkutty. Right of first respondent to have a share

in the property cannot be disputed. Even though it was argued that because of Ext.A1 partition deed, first respondent is not entitled to claim a share, as rightly pointed out by learned counsel appearing for respondent by virtue of Ext.B1 decree in O.S.99/1963 Ext.A1 partition deed cannot have any validity as regards the rights of first respondent. Ext.A1 partition deed was executed only on the basis that except the rights of Ayissakutty, Mohammedkutty obtained the rights of all other shares. When the release deed executed by one of the sharers was cancelled by the decree in a suit filed by that sharer and the share due to her was allotted and properties have been taken possession by the sharer, Ext.A1 collapses. By virtue of the decree in O.S.99/1963, the validity of which was not disputed in the suit, portions of the properties divided under Ext.B1 were separated. Hence appellant cannot claim any right obtained by his assignor's assignor under Ext.A1. Exts.B2 and B3 cannot be challenged on that ground also. Hence Ext.A1 partition deed will not disentitle first respondent from claiming her share in O.S.212/1978 or invalidates the decree obtained therein. A fraud is an act of deliberate deception with the design of securing something by taking undue advantage of another. It is a

deception in order to gain by the loss of another. As fraud affects the solemnity, regularity and orderliness of the proceedings of the court, it amounts to an abuse of the process of the court and court has inherent jurisdiction to set aside an order obtained by fraud **(Indian Bank v. Sathyam Fibres (1996 (5) SCC 550)). A**s declared by the apex court in **Shrisht Dhawan v. Shaw Bros. (1992 (1) SCC 534)** "fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct." Fraud definitely is anathema to all equitable principles. So also any affair tainted with fraud cannot be perpetuated.

11. But the question is whether appellant could establish any fraud or collusion. The case projected was that the facts of releasing of their rights by Kunhathumma, Kathiyumma and Mammerriyumma were suppressed and the assignment of the rights of Mohammedkutty was also disclosed and it amounts to fraud and collusion. First respondent Ayissakutty Umma, the plaintiff in O.S.212/1978 did not release or assign her rights. Therefore she cannot be accused of any fraud for non disclosure.

12. There was no evidence to prove that she was aware of alienation made by Mohammedkutty. Therefore it cannot be said that first respondent has played any fraud on the court in obtaining Ext.B3 decree by suppressing either expressing release deed or assignment deed executed by Muhammedkutty. Case of appellant is that Muhammedkutty, first defendant in that suit and defendants 2,4 and 5 who released their right in favour of Muhammedkutty. Suppressed the factum of release deed and therefore Ext.B3 decree is the result of fraud. On the evidence, I cannot agree with the submission. Under Ext.B3 decree, learned Sub Judge found that under the decree in O.S.99/1963 Kunheema Umma was separated. Hence the properties allotted to her in the final decree were excluded from partition. It was found that the other six children of Moideenkutty are entitled to the balance properties and plaintiff in O.S.212/1978 is entitled to get her share separated. Legally first respondent is entitled to get her share. Other defendants did not seek separation of their share in that suit. Under Ext.B2 judgment only the share of plaintiff therein was separated. But decree shows that share of first defendant Mohammedkutty was also declared. Both the trial court and the first appellate court found that no fraud or

collusion was established. It is a finding of fact. On the evidence it cannot be held that Exts.B2 and B3 are vitiated. When Ext.B3 judgment is challenged on the ground of fraud, appellant is bound to plead the details of fraud in the plaint. Though learned counsel appearing for appellants submitted that fraud alleged was not against first respondent but against defendants in that suit, on going through the plaint in O.S.36/1983, I cannot agree with the submission. What was pleaded in para 5 of the plaint was that plaintiff approached the court and suppressed the facts of release deed as well as assignment deed and thereby fraudulently obtained the decree. There is no allegation that defendants committed any fraud on the court. On the evidence no fraud was proved. Though defendants have not disclosed the release deed or alienation, it cannot be said that Ext.B3 decree vitiated by fraud.

13. Though relying on the decision of this court in **K.A.Khader v. Rajamma John Madathil and others (1993 (2) KLJ 575)** and Apex court in **Renu Devi v. Mahendra Singh and others (2003 (10) SCC 200)** it was argued that release deeds executed by sisters of Muhammedkutty are not void and rights obtained by Muhammedkutty could only be

subject to Ext.B1 decree in O.S.99/1963 and by operation of Section 43 of Transfer of Properties Act, as and when executants of the release deed obtained their share separated, it should enure to the benefit of first respondent and by the assignment deed executed by Mohammedkutty appellant obtained that right, in the present suit they are not relevant matters to be decided. As per the decree in O.S.212/1978 share of first respondent was declared. Appellant could only claim the right obtained under Exts.A6 and A7. Appellant under Exts.A6 and A7 could only claim the right which was available with Mohammedkutty at the time of Ext.A2. Learned District Judge made it clear that appellant has to work out that remedy. Appellant is not entitled to any relief in the suit. I find no merit in the appeal.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.451 OF 1992

27th February 2007

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